

NOTICE

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IN THE COURT OF APPEALS OF THE STATE OF ALASKA

RICHARD DORSEY,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11529
Trial Court No. 3AN-09-12682 CR

MEMORANDUM OPINION

No. 6339 — May 25, 2016

Appeal from the Superior Court, Third Judicial District,
Anchorage, Michael Spaan, Judge.

Appearances: Cynthia Strout, Attorney at Law, Anchorage, for
the Appellant. Eric A. Ringsmuth, Assistant Attorney General,
Office of Criminal Appeals, Anchorage, and Craig W. Richards,
Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock,
Superior Court Judge.*

Judge ALLARD.

A jury convicted Richard Dorsey of four counts of first-degree sexual
assault, two counts of attempted first-degree sexual assault, one count of second-degree

* Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska
Constitution and Administrative Rule 24(d).

assault, and five counts of third-degree assault for acts he committed against five different women between 2001 and 2004.

On appeal, Dorsey raises the following claims of error: First, he argues that the initial search warrant in his case was an impermissible general exploratory warrant based on stale evidence and the court therefore erred in failing to suppress the evidence obtained through this warrant. Second, he argues that the court erred when it allowed the State to introduce evidence that Dorsey possessed erectile dysfunction medication because the evidence had no relevance to any material issue in the case and was designed only to humiliate and unfairly prejudice him in the eyes of the jury. Third, he argues that the court erred when it permitted the State to introduce evidence of Dorsey's prior conviction for second-degree sexual assault. Fourth, he argues that the court committed plain error when it permitted what Dorsey characterizes as improper "vouching" testimony by one of the investigating detectives. And lastly, Dorsey argues that the prosecutor's closing argument was improper and undermined the fundamental fairness of his trial.

For the reasons explained here, we conclude that Dorsey is not entitled to reversal of his convictions on any of these claims of error.

Background facts and prior proceedings

The initial investigation

In 2006, Richard Dorsey approached a woman in an Anchorage Carrs grocery store, lifted her skirt, touched her vaginal area, and then fled. Dorsey was apprehended a few minutes later and charged with second-degree sexual assault.¹ A jury convicted Dorsey of this crime in 2009.

¹ AS 11.41.420.

The detectives who investigated this case — Anchorage Police Detectives Jean Dupuis Jr. and Kenneth McCoy — were puzzled about why Dorsey would go to trial in a case that was so straightforward. Detective McCoy speculated that Dorsey might be worried that, if convicted, he would be obligated to provide a DNA sample, and that this sample would tie Dorsey to unsolved sex crimes. So McCoy and Dupuis began a review of cold cases in which Dorsey might be a possible suspect.

McCoy subsequently discovered a 2007 police report filed by a woman named R.D., who called the police to report that, while walking through an Anchorage Wal-Mart parking lot, she recognized a tall black male who she claimed had raped her twice when she was working as a prostitute in 2002 and 2003. Although the man fled when R.D. confronted him, she managed to follow him to his truck and memorize his license plate number. This plate number was assigned to a truck registered to Dorsey.

The 2007 report included R.D.'s descriptions of the two rapes. She reported that she was working as a prostitute in 2002 and that the man picked her up in Anchorage, drove her to a secluded location in a small blue pickup truck, and then put a knife to her throat while he raped her. R.D. reported that she was picked up again by the same man approximately nine months later, in 2003, although she did not initially recognize him because he was driving a different truck. During the second encounter, the man again produced a knife, and he again raped R.D. R.D. told police officers that she had not reported these two rapes at the time because, as a prostitute, she felt that no one would believe her.

After Detective McCoy discovered R.D.'s 2007 police report, Detective Dupuis came across a similar report filed by a woman named B.W. in 2002. In this report, B.W., who was also working as a prostitute, described being picked up by a tall black male driving a small blue pickup truck. The man drove B.W. to the parking lot of the Northern Lights Hotel in Anchorage, where he produced a knife, held it to B.W.'s

throat, told her to take off her clothes, and raped her. (The man also stole \$200 from B.W.) Although the police were not able to identify a suspect, they were able to recover a sperm sample from B.W. that was entered into the Combined DNA Index System (CODIS).²

Because there was a DNA sample of a rapist whose description and truck matched Dorsey, McCoy took a cup that he had observed Dorsey drinking water from during Dorsey's 2009 trial and he had this cup tested for DNA. The DNA sample on the cup matched the DNA in the sperm sample collected from B.W. The detectives later obtained a warrant for Dorsey's DNA and were able to confirm that Dorsey's DNA matched the DNA found in B.W.

Based on further investigation, the detectives were also able to confirm that Dorsey had previously owned a small, light blue pickup truck with a bench seat that matched both R.D.'s and B.W.'s descriptions of the vehicle used by their attacker. They also learned that Dorsey had a military background, and that he had been transferred to Alaska from California during his military service — facts that B.W.'s assailant had shared with her before the rape.

As part of this ongoing investigation, the detectives also identified three more female prostitutes — M.M., D.J., and S.R. — who had also been the victims of unsolved attempted rapes and/or assaults between 2001 and 2004 and whose descriptions pointed to Dorsey as the potential perpetrator. M.M. and D.J. later identified Dorsey as their rapist in photo line-ups.

² CODIS is the generic term used to describe the FBI's program of support for criminal justice DNA databases as well as the software used to run these databases. *See* <https://www.fbi.gov/about-us/lab/biometric-analysis/codis/codis-and-ndis-fact-sheet> (last visited May 13, 2016).

S.R. had provided the police with Dorsey's license plate number. She reported that Dorsey physically assaulted her after she refused to have sex with him. Dorsey was interviewed at the time of S.R.'s report in 2004 but was not charged with any crime.

The search warrant for Dorsey's home

Based on their investigation, McCoy and Dupuis applied for and obtained a search warrant for Dorsey's home. The search warrant authorized the police to search Dorsey's home for:

1. Documents indicating ownership or occupancy of the residence
2. Documents indicating ownership of vehicles past and present
3. Photographs of the interior and exterior of the residence or building
4. Knives: pocket, box, steak (kitchen), and hunting.

During the search of Dorsey's home, the detectives seized fourteen knives. They also found a number of items that they viewed as potentially incriminating, including cards from a free clinic that treated sexually-transmitted diseases, several "true crime" books and crime-related newspaper clippings, erectile dysfunction medication, a ski mask, and a gun. The detectives later seized these items after receiving an amended warrant. In addition, the investigators found and read a journal belonging to Dorsey's wife.

Prior to trial, Dorsey filed a motion attacking the search warrants as impermissible general exploratory warrants that unlawfully permitted wholesale rummaging through Dorsey's house based on stale information that lacked any particularity or reliability. The trial court agreed that the warrant's authorization for

documents indicating “ownership or occupancy” of Dorsey’s home was improper — because Dorsey’s ownership was not in doubt, nor was his ownership of his house relevant to any of the alleged crimes. The court therefore struck this clause of the warrant and suppressed the evidence obtained pursuant to it. The court otherwise upheld the legality of the warrant.

Indictment and trial

In 2009, Dorsey was indicted on four counts of first-degree sexual assault, two counts of attempted first-degree sexual assault, one count of second-degree assault, and five counts of third-degree assault for his 2001-2004 attacks on R.D., B.W., M.M., D.J., and S.R.³

At trial, the detectives testified to their investigation of the case, and all five women testified to the details of their encounters with Dorsey. Over Dorsey’s objection, the State was also permitted to introduce evidence of Dorsey touching the woman’s vaginal area in the Carrs grocery store in 2006 — the conduct that began the detectives’ investigation and which resulted in his 2009 conviction for second-degree sexual assault.

Dorsey testified in his own defense. In his testimony, he admitted to frequenting prostitutes in the Spenard area, but he denied ever meeting R.D., M.M., or D.J. Dorsey admitted to having sex with B.W., but he asserted that these encounters were consensual. Dorsey also admitted that he had met S.R., but he denied that he had picked her up for sex or assaulted her; instead, he claimed that S.R. had once flagged him

³ AS 11.41.410(a)(1), AS 11.41.410(a)(1) & AS 11.31.100(a), AS 11.41.210(a)(1), and AS 11.41.220(a)(1)(A), respectively.

down as he was driving and offered to sell him drugs, and that he drove away without attacking her. Dorsey denied sexually assaulting or robbing any of the five women.

The jury convicted Dorsey on all charges. Dorsey now appeals.

Dorsey's first claim on appeal: the search warrant issue

Both the Alaska and federal constitutions provide that “no warrants shall issue, but upon probable cause ... and particularly describing the place to be searched, and the persons or things to be seized.”⁴

On appeal, Dorsey renews and further elaborates his claim that the warrant authorizing the initial search of his house was an impermissible general exploratory warrant that relied on stale information and failed to describe the intended objects of the search with sufficient particularity.

We find little merit to Dorsey's claim that the information used to support the warrant was too stale, given the serial nature of the crimes alleged. As we previously explained in *Snyder v. State*,⁵ staleness turns “more on the nature of the unlawful activity alleged in the affidavit than the dates and times specified therein.”⁶ We also noted that “where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.”⁷

⁴ U.S. Const. amend. IV; Alaska Const. art. I, § 14; *see also Namen v. State*, 665 P.2d 557, 561 (Alaska App. 1983) (explaining that a search warrant must “describe the property to be seized in a manner that is reasonably specific under the circumstances of a given case”).

⁵ 661 P.2d 638 (Alaska App. 1983).

⁶ *Id.* at 647.

⁷ *Id.* (quoting *U.S. v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972)).

We reject Dorsey’s contention that the authorization to search for knives was unconstitutionally broad, given the information presented to the magistrate who issued the warrant. As we explained in *Namen v. State*, the adequacy of a warrant’s description of a particular item sought is evaluated according to (a) the amount of detail actually provided in the warrant; (b) the amount of additional detail that could have reasonably been provided; and (c) the extent to which this detail would have guided officers in executing the warrant.⁸ Here, investigators had received descriptions of two different knives from Dorsey’s victims: one victim described Dorsey using a “combat-type” knife, while another described a pocket knife. Based on this limited information, the serial nature of Dorsey’s alleged crimes, and the reasonable possibility that the warrant would uncover other knives linking Dorsey to his victims, the warrant’s authorization of a search for “pocket, box, steak (kitchen), and hunting” knives was sufficiently particular to withstand the constitutional challenge in this case.

Moreover, even if we agreed with Dorsey that the trial court erred in upholding the remainder of the search warrant and failing to suppress all of the evidence obtained through the warrant, we are not convinced that this error would entitle Dorsey to a reversal of his convictions. Regardless of whether the warrant was overly broad, the fact remains that the search of the house ultimately produced very little incriminating evidence. Most of the items seized from the house (*e.g.*, the “true crime” novels, the gun, the ski mask, the journal, etc.) were not admitted at trial and the items that were admitted (*e.g.*, the erectile dysfunction medication and the cards from the free clinic that treated sexually-transmitted diseases) were of marginal relevance and unlikely to have any impact on the jury. This case ultimately turned on the credibility of the five victims, the

⁸ *Namen*, 665 P.2d at 562.

credibility of Dorsey's own testimony, and the DNA evidence, not the largely irrelevant evidence obtained through the search warrants.⁹

Dorsey's second claim on appeal: the admission of Dorsey's erectile dysfunction medicine

Among the items recovered from Dorsey's home during the execution of the search warrant were several samples of erectile dysfunction medication. Over Dorsey's objection, the trial judge allowed the State to introduce this fact at trial. Later, the prosecutor briefly questioned Dorsey concerning his possession of this medication. On appeal, Dorsey argues that this evidence was irrelevant and that it prejudiced him by leading jurors to "speculate ... that [he] had some type of sexual deviancy."

The State asserts that the evidence was relevant to Dorsey's ability to have sexual intercourse during the relevant time periods despite being in a serious car accident in 2002. But the State also concedes that Dorsey's ability to participate in sexual intercourse was never directly challenged, and that Dorsey's wife testified at trial that she became pregnant during the same period that Dorsey suffered from the car accident injuries.

We therefore agree with Dorsey that the superior court erred in allowing the prosecutor to introduce this essentially irrelevant evidence at trial. We also conclude, however, that the error was harmless. The prosecutor's questions about this medication were brief. And, contrary to Dorsey's claim on appeal, the prosecutor did not use the evidence to paint Dorsey as a "sexual deviant." Moreover, as already noted, this case turned primarily on the credibility of the victims and the credibility of Dorsey's denials. Knowledge that Dorsey had samples of erectile dysfunction medication was unlikely to

⁹ *Love v. State*, 457 P.2d 622, 634 (Alaska 1969).

appreciably affect the jury's verdicts in this case or to have any impact on the jury's deliberations.¹⁰

Dorsey's third claim of error: the admission of evidence related to Dorsey's 2006 conviction for second-degree sexual assault

During trial, the State sought to introduce evidence of Dorsey's 2006 sexual assault of the female shopper at Carrs, arguing that this evidence was admissible under Alaska Evidence Rule 404(b)(3), which allows admission of a defendant's past sexual assaults if the defendant raises consent as a defense. The trial judge found the 2006 sexual assault admissible under the multi-factor test set out by this court in *Bingaman v. State*,¹¹ but the court conditioned its admission on Dorsey specifically raising a consent defense. Later in the trial, Dorsey testified that his sex with B.W. was consensual. The State then renewed its request to admit evidence of Dorsey's 2006 sexual assault, which the trial court granted.

On appeal, Dorsey concedes that the evidence was potentially admissible under Evidence Rule 404(b)(3), but he argues that if the court had undertaken a more thorough *Bingaman* analysis, it would have found that evidence was more unfairly prejudicial than probative given the obvious dissimilarities between the sexual touching that occurred at Carrs and the multiple rapes of prostitutes alleged here. Having reviewed the record, we conclude that the court's 404(b)(3) ruling was within its discretion. We note that the trial court took appropriate steps to mitigate the potential for unfair prejudice by limiting the State's presentation to a single witness and instructing the jury on the proper use of this evidence.

¹⁰ *Id.*

¹¹ 76 P.3d 398 (Alaska App. 2003).

Dorsey's fourth claim of error: the allegedly impermissible "vouching" testimony by the detective and the prosecutor's use of this testimony during closing argument

Part of the defense theory at trial was that the detectives had engaged in sloppy investigative work and had been driven by "confirmation bias" to find Dorsey guilty of additional sexual crimes following his arrest for the 2006 Carrs incident. In accordance with this theory, the defense attorney asked Detective McCoy a series of questions on cross-examination that were designed to highlight the lack of similarity between the 2006 Carrs incident and the sexual assaults with which he was now charged.

On re-direct, in an attempt to get the detective to explain why the 2006 incident had led to investigation of rape cases, the prosecutor asked the detective a series of leading questions about whether the 2006 case "signaled an escalation" in the defendant's conduct such that the police became concerned that there were less public sexual crimes in Dorsey's past. The detective agreed with the prosecutor that the public assault on a woman who was otherwise unknown to Dorsey "was a definite escalation in [his] opinion." The detective also agreed with the prosecutor that people do not go from "zero to sixty" like that. The defense attorney did not object to the prosecutor's leading questions or to the detective's testimony.

On appeal, Dorsey argues that the superior court should have *sua sponte* intervened in this questioning despite the absence of a defense objection. We agree with Dorsey that the prosecutor's leading questions were inappropriate and the detective's testimony was improper opinion evidence that presumed the truth of the charges currently before the jury. We also agree with Dorsey that this testimony was particularly problematic given the lack of any foundation or expert support for the detective's "escalation" theory of sexual misconduct.

But we also conclude that, for similar reasons, the testimony had minimal impact on the jury who undoubtedly viewed it for what it was — a speculative unsupported theory of marginal value to the actual issues before the jury. As we have previously commented, this case ultimately turned on the credibility of the witnesses, including the credibility of Dorsey’s own testimony. Although we do not condone the prosecutor’s leading questions or her later use of this improper opinion testimony during closing argument, we do not find plain error in the court’s failure to intervene.

Dorsey’s fifth claim: prosecutorial misconduct during closing argument

Dorsey also argues that the following argument made during the prosecutor’s rebuttal argument was improper:

No police officer or district attorney [worth] their [salt] wants to convict the wrong person intentionally. That means that somebody guilty is going free. Police officers, DAs, they’re not about that. It’s not confirmation bias. The State and the police officers that did their jobs in this case looked for facts and they looked for truth, and you can weed through those [facts] and decide what the truth is here.

The defense attorney did not object to this argument at trial.

We agree with Dorsey that the first part of this argument was improper to the extent that the prosecutor appeared to be personally vouching for the good faith of police officers and district attorneys and to be encouraging the jury to defer to the conclusions reached by these trained and honest professionals. As we have previously held, a prosecutor may not assert that “police professionals who know how to evaluate a criminal case have determined that [a defendant] is guilty, and the jury should accept their conclusion.”¹²

¹² *Henry v. State*, 861 P.2d 582, 591 (Alaska App. 1993).

But we conclude that the second part of the argument largely cured whatever prejudice might have resulted from the improper argument — because it directly reminded the jury that they were the ultimate fact finders and that it was their job to “weed through” the evidence and “decide what the truth is here.”

We therefore deny this plain error claim.

Conclusion

We AFFIRM the judgment of the superior court.